BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER	)	
	)	
IMPLEMENTATION OF SECTIONS 3(N) AND 332 OF THE COMMUNICATIONS ACT	)	GN DOCKET NO. 93-252
	)	
REGULATORY TREATMENT OF MOBILE SERVICES	)	
	)	

SBC'S INITIAL COMMENTS
ON *FURTHER NOTICE OF PROPOSED RULEMAKING*

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SUMMARY

The Commission should define "substantially similar common carrier services" for purposes of administering comparable technical and operation requirements by using the four-prong test for defining a commercial mobile radio service ("CMRS") adopted in the *Second Report and Order* in this proceeding. Such a test will ensure that all services which are substitutable will be subject to comparable rules and thereby allow the market rather than regulation to govern competitive outcomes.

The Commission should not impose any cap on spectrum aggregation so long as all CMRS providers are treated consistently. Such a cap will foreclose efficient, experienced providers from providing services which their customers will need and want, without any proof that market abuses require such limits. Caps on aggregation of spectrum licensed for a particular CMR service, such as the PCS aggregation cap, will answer any market power concerns.

The serving areas for wide-area or enhanced specialized mobile radio ("ESMR") service should not be self-designated. Permitting such self-designation would skew the competitive process in favor of ESMR without adequate rationale. For the same reason, the power limits for ESMR systems, both base stations and mobile stations, should be brought into parity with the rules for the

cellular systems which will compete with them for customers. A similar change should be made to the allowed power limits for mobile stations in personal communications service ("PCS") systems.

The interoperability requirements currently imposed on cellular carriers should not be expanded to other CMRS services. Because interconnection with the public switched network is always available to such carriers, the additional costs which interoperability would impose outweigh any benefits.

Because the Commission has expressed a willingness to entertain rules on ESMR providers' eligibility for PCS licenses in this docket, Southwestern Bell urges the Commission to impose restrictions on such eligibility similar to those imposed on cellular carriers.

Finally, Southwestern Bell offers some revisions to clarify the forms proposed for use by CMRS providers.

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In the Matter	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

SBC'S INITIAL COMMENTS
ON FURTHER NOTICE OF PROPOSED RULEMAKING

Southwestern Bell Corporation ("Southwestern Bell"), on behalf of itself and its operating subsidiaries, offers these initial comments in response to the Federal Communications Commission's ("FCC") *Further Notice of Proposed Rulemaking* ("*FNPRM*") in GN Docket No. 93-252, released May 20, 1994. While the *FNPRM* seeks comment on a myriad of minutiae related to the details of carrying Congress's mandate of parity in regulation of commercial mobile radio service providers,[1] Southwestern Bell limits its comments to a few significant areas.

I. THE COMMISSION SHOULD DEFINE "SUBSTANTIALLY SIMILAR" SERVICES FOR PURPOSE OF ADMINISTERING TECHNICAL AND OPERATIONAL REQUIREMENTS BY APPLYING THE FOUR-PRONG TEST FROM THE *SECOND REPORT AND ORDER* HEREIN.

As the Commission noted, a key requirement of the *Budget Act* is the Congressional directive to equalize regulation of carriers previously treated as private radio providers but whose service is "substantially similar" to cellular and other

[1] *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, Section 6002(d)(3)(B))("*Budget Act*").

publicly-offered mobile services. *Budget Act*, § 6002(d)(3)(B).[2] Indeed, the Commission's own analysis of these provisions of Congressional intent make clear that "Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment."[3] Curiously, however, the Commission interprets the statutory language as providing yet another rationale for **differentiating** treatment among CMRS providers. Instead of accepting the obvious conclusion that all CMRS should be regulated similarly, the FCC proposes first to assess whether the two services to be compared are marketed as substitutes for each other and whether customers view the two services as substitutes for each other.[4]

A far easier regulatory framework to apply would be the four-prong test adopted by the Commission to determine whether a service should be classified as commercial mobile radio service:[5] (1) Is the service offered for profit? (2) Is it interconnected, directly or indirectly, to other networks? (3) Is it available to the public or such classes of eligible users as to be effectively available to a substantial portion of the public? (4) If not, is it functionally equivalent to a CMRS? If this four-prong test is adequate for meeting the broader, more

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[2] *FNPRM*, ¶¶ 5, 10, 12.

[3] *FNPRM*, ¶ 12.

[4] *Id.*, ¶ 13.

[5] *See* Docket No. 93-252, *In the Matter Of Implementation Of Sections 3(n), also see 332 of the Communications Act. Regulatory Treatment or Mobile Services*, released March 7, 1994.

important goal of determining what services are eligible for a uniform regulatory framework, it certainly should be appropriate for this more limited application of comparable technical and operational standards. To one degree or another, all interconnected mobile services are substitutable for each other and thus should be regulated in the same manner.

Equally compelling to this conclusion is the Commission's observation that the market and not regulation should "...shape the development and delivery of mobile services to meet the demands and needs of consumers."[6] If the agency truly wishes to rely on market forces to "...ensure that the most efficient service providers prevail," to "...create incentives for firms to offer innovative and improved services at the lowest possible costs," and to "...ensure that investment decisions are driven by consumer demands rather than regulation," the only choice for implementing the Congressional directive of parity regulation is to apply it equally to **all** CMRS services.

Of critical importance, however, to all cellular providers is that the Commission adopt parity regulation for ESMR and PCS. Because the Commission has specifically crafted the regulation of ESMR and PCS to foster competition with cellular providers, the Congressional directive of parity regulation for substitutable, competitive services clearly should be applied to cellular, PCS and ESMR services. Most importantly, the Commission should clearly distinguish regulatory parity (*e.g.*,

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[6] *Id.*

pricing flexibility, tariff filing requirements, complaint procedures, licensing applications, other system filings) to which all CMRS providers should be equally subject, from technical parity (*e.g.*, power outputs), which will necessarily differ at times due to spectrum capabilities and radio propagation characteristics. With regard to the latter, parity is a matter of placing technical aspects on a level playing field such that, though the rules may differ, the effect of those rules should be substantially similar. *See* §§ III and IV *infra*. For example, to the extent possible, all CMRS providers should be allowed to propagate waves over a substantially similar geographic area pursuant to rules which tend to equalize operational differences where competition for customers is concerned.

II. THE COMMISSION SHOULD NOT ADOPT ANY SPECTRUM AGGREGATION CAPS BEYOND SERVICE-SPECIFIC CAPS.

In the *FNPRM* the FCC proposes to impose a spectrum aggregation cap on all CMRS providers in addition to the various caps imposed by specific service licensing rules. The rationale offered for this rule is that so much spectrum will soon be available for new services that aggregation without limits, even when the spectrum is licensed for **different** service definitions, will enable licensees "...to acquire excessive market power by potentially reducing the numbers of competing providers...."[7] The Commission reaches this tentative conclusion regardless of

[7] *Id.*, ¶ 89.

whether CMRS is viewed as a single or multiple markets. If CMRS is a single competitive product market, the cap is viewed as a useful means of "...guarding against the exercise of undue market power in this single market."[8] If CMRS consists of several discrete markets, the cap is viewed as preferable because each CMRS could be considered a sub-market of CMRS generally, and excessive spectrum aggregation might allow a licensee to exercise market power in the general CMRS market. Finally, the FCC reasons that even if CMRS is not a single market presently, it may evolve to one.[9]

Several flaws in this logic train are obvious. First, the Commission determined in the *Second Report and Order* herein that CMRS is **not** a single competitive market.[10] Elsewhere in the instant *FNPRM*, the Commission comes to what amounts to the same conclusion, when it holds that one CMRS service may not be "substantially similar" to another.[11] Second, if CMRS is not a single competitive product market, it is nearly impossible to imagine how aggregation of spectrum for multiple CMRS applications could give a provider "market power" in the "general CMRS" market, since such a market is presumed not to exist.

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[8] *Id.*

[9] *Id.*

[10] *Second Report and Order, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment Mobile Services*, GN Docket No. 93-252, released March 7, 1994, ¶ 136.

[11] Southwestern Bell disagrees with both of these conclusions.

Regardless of whether CMRS is one or multiple markets, no one has demonstrated any serious possibility of exerting market power by aggregating spectrum in today's array of wireless possibilities. The fact that over 200 MHz of **additional** spectrum will be available within the next several years (through Congressional mandate) is likely to result in a sufficient amount of spectrum. This conclusion is particularly compelling when one prognosticates the probable effect of the availability of digital transmission techniques, CDMA and TDMA, for example. With so much of a single resource about to come on the market, the likelihood of stockpiling spectrum to thwart competitive entry is unlikely.

Imposition of any multiple CMRS spectrum aggregation cap could have serious, unintended consequences, consequences which are the antithesis of the Commission's desire to allow "market forces to shape the demand and delivery of mobile services to customers." [12] If the FCC adopts a 40 MHz cap, as tentatively proposed in the *FNPRM*, a service provider that is currently (and efficiently) using all the spectrum that it is assigned could be precluded from offering **any** new wireless service because it would not be able to acquire the necessary spectrum. An obvious example is the fact that wireless drop applications would be foreclosed by the cap to any local exchange telephone company which is affiliated with a cellular provider in its region. Other services such as mobile satellite service

[12] *FNPRM*, ¶ 13.

might also be foreclosed.

The spectrum aggregation cap itself is more likely to discourage rather than encourage competitive entry, despite the Commission's conclusion to the contrary.[13] The Commission actually may find that it is faced in the near term with an inadequate number of technically or financially qualified applicants because so much new spectrum will become available. Thus a spectrum aggregation cap will foreclose entry opportunities to those carriers that are using the maximum amount of spectrum under any cap. Surely the public interest would not be served by denying one carrier, who completely utilizes available spectrum, access to other spectrum which might otherwise lie fallow or be used less efficiently. The obvious loser in either instance is the consumer.

Obviously, a cap would unfairly disadvantage those providers involved in offering different wireless solutions to their customers. This result is particularly troublesome given the benefit to customers of "one-stop shopping" and the benefit to the development of the industry's technology and innovation from participation by experienced wireless providers. Particularly where there has been no showing of the possibility of creating the feared market power or of exercising it in a way to harm customers, the imposition of a cap as a "prophylactic remedy" seems much too harsh.

The administrative difficulties of creating and

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[13] *Id.*, ¶ 91.

policing a spectrum aggregation cap illustrate additional reasons for rejecting the rule. It would be difficult at this time to determine an appropriate spectrum cap, given not only the growing number of services that use radio spectrum, but also services that are yet to be developed. There are simply too many unknowns for the FCC to attempt to develop such a cap at this time. Further, innumerable questions must be answered, each of which pose the possibility that a deserving applicant will be denied simply because of an unnecessary and overbroad rule. Should there be two caps, one for broadband services and another for narrowband, and by what rationale can the FCC treat these categories differently under the new statutes? Which services would be aggregated, and under which caps? Which of the multiple geographic licensing area schemes (MSA/RSA? MTA/BTA? Station coverage? Self-designation?) would prevail for determining exceeding the cap? Should MSS be included, and how? When should minority interests be attributed to disqualify the applicant, and why? How could the rules be monitored and enforced?

As long as all CMRS providers are given the same opportunity to acquire spectrum for each broadband wireless service (through service-specific rules designed to achieve parity) there is no need for the FCC to place an arbitrary limit on the total amount of spectrum that can be assigned to CMRS providers. The FCC should not attempt to further regulate the wireless industry, just at the moment when other, non-cellular services (ESMR, PCS, MSS, etc.) are about to compete with

traditional cellular service. At this moment of unprecedented explosion of competitive entry and innovation in alternatives, Southwestern Bell supports the use of service-specific rules, which create parity among all providers, as the most reasonable, efficient and pro-competitive approach.

III. THE COMMISSION SHOULD NOT ALLOW ESMR PROVIDERS TO "SELF-DESIGNATE" SERVICE AREAS.

The FCC proposes (in ¶ 33), as an alternative to MTA-based licensing for wide-area SMR, that 800 MHz SMR licensees be allowed to establish and operate in self-defined service areas. Under one approach, the licensee would designate the areas in which it intended to operate based either on the aggregate area covered by existing authorizations or on new applications to cover designated areas where frequencies are available. Under another approach, the FCC would require licensees who are constructing wide-area systems under extended implementation authority to define their service areas only at the end of the transition period for grandfathered licenses (August 10, 1996).

Southwestern Bell is opposed to any approach by the Commission that would provide an unfair competitive advantage to wide-area SMR operators on the basis of license serving areas. Coverage area is one of the single most critical selling points for wireless services. Non-SMR CMRS providers (cellular and PCS carriers) would be placed at a significant competitive disadvantage vis-a-vis SMR operators if SMR operators are allowed to define their own service areas and other CMRS providers may only serve pre-defined service areas, which are already unequal

among those providers.

Similarly, SBC opposes the Commission's proposal (in ¶ 34) to license 900 MHz SMR on an MTA, BTA and nationwide basis. Such a license area advantage vis-a-vis cellular providers was adamantly opposed by SBC in the PCS proceeding and the same arguments made there are no less appropriate for 900 MHz SMR licenses. Parity in license areas for all CMRS providers is necessary to maintain competitive and regulatory equity. The Commission alludes to a "parity solution" (¶ 29) by seeking comment on a suggestion to license wide-area SMR on a basis comparable to its licensing of cellular and broadband PCS spectrum. SBC concurs with this approach and encourages its adoption.

Southwestern Bell continues to support the policy that CMRS providers should be able to offer equivalent local calling areas and to be under the same obligation to provide equal access. If the notion of self-defined service areas is not rejected for the reasons stated above, the Commission at least should defer that issue for the equal access proceeding where the issue could be more fully and completely explored, without a short deadline. Otherwise, competition and the consumer will suffer as a result.

MCI's proposed transaction with NEXTEL succinctly illustrates how the damage would be done. If that transaction is approved by the Commission and NEXTEL is able to self-define service areas, NEXTEL will be able to provide service from coast

to coast, and default all interexchange traffic to MCI. Unless its competitors have the same freedoms, competition necessarily will be harmed.

IV. THE FCC SHOULD EQUALIZE BASE STATION AND MOBILE STATION POWER LIMITS.

Because certain SMR systems (trunked and conventional systems in urban areas) utilize spectrum in very close proximity to cellular spectrum and have base station power limits of 1000 watts effective radiated power (twice the ERP allowed for cellular providers), SBC urges the Commission to reduce the power limits for SMR systems to bring them into parity with competing cellular systems. In the alternative, SBC urges the Commission to revise existing cellular rules to allow cellular providers to increase their base station power to 1000 watts ERP. If the FCC does not make either of these changes, cellular providers will be placed at a competitive disadvantage vis-a-vis SMR providers because it will be necessary for the cellular carriers to construct more base stations to cover the same size area as the SMR providers. This will unnecessarily increase cellular carriers' costs of providing an equivalent service to the same customers, creating a competitive disadvantage.

Given the inequity which exists between the ERP power limits for cellular mobiles and portable and SMR mobiles, 7 watts and 100 watts respectively, SBC simply urges the Commission to establish equitable power limits for all CMRS mobiles (SMR, cellular and PCS) on the basis of its (yet to be released) findings in ET Docket 93-62, 8 F.C.C.R. 2849 (1993) (RF Radiation

Notice). As discussed in the *FNPRM* (¶¶ 47,53), the FCC has proposed to adopt the 1992 ANSI/IEEE standard governing exposure to radiofrequency radiation for all CMRS and PMRS mobiles. Adoption of this standard would lower the permissible power of low-power hand-held mobile units used in all land mobile services. SBC supports the FCC's proposed adoption of the ANSI/IEEE standard and further urges the Commission to adopt the standard on a uniform and consistent basis for all CMRS providers. This standard incorporates the latest scientific data relating to possible biological and environmental effects of radio frequency radiation. Thus, all CMRS providers should be willing to uniformly adopt this standard to help assure that no harmful biological or environmental effects are incurred from the use of wireless mobile stations.

V. THE COMMISSION SHOULD NOT EXTEND INTEROPERABILITY REQUIREMENTS ACROSS SERVICE BOUNDARIES.

In ¶ 57, the Commission asks commenters to address whether it should: (1) establish standards to achieve interoperability among all classes of CMRS equipment; (2) establish standards only to promote interoperability among different types of equipment used to provide the same type or class of CMRS service; or (3) maintain the status quo by retaining interoperability requirements for cellular equipment but refraining from any extension of these requirements to other classes of CMRS services. While SBC does not quarrel with the current interoperability requirements for cellular equipment, SBC opposes an extension to promote interoperability among different

classes of CMRS equipment (the Commission's first option).

Interoperability would increase the sophistication of the handsets. But this increase in sophistication would likely increase the size and weight of the handsets, as well as place additional strain on the handsets' battery. Size, weight and battery life are all critical to the acceptance of handsets by subscribers. Anything which would negatively impact these characteristics would not be welcome by the consumer or the industry. Furthermore, this change would certainly increase the cost of the handsets at a time when the handsets are becoming more and more affordable to a larger number of subscribers.

While the move to interoperability would create several unwanted side effects, it would not likely have a positive impact on the ability of a CMRS user to access the public switched network. In fact, so long as interconnection with the PSTN is available, interoperability of handsets is unnecessary to facilitate communication. It is unclear how much demand exists for interoperability and its potential impact on the development of competition in the CMRS market is unknown. For these reasons, SBC opposes any extension of the interoperability requirements and urges the Commission to maintain the status quo as far as cellular carriers are concerned. SBC takes no position concerning adoption of interoperability standards for other types of classes of providers within the CMRS category.

VI. THE COMMISSION SHOULD CLARIFY ITS PROPOSED FORMS.

In Appendix A to the *FNPRM*, the Commission has attached

proposed forms to be used by CMRS providers. In the interests of avoiding unnecessary problems in completing the forms and thus streamlining Commission procedures, Southwestern Bell suggests the following changes to the forms.

On Form XX, Schedule C, entitled "Technical Data," items "C22, Distance to SAB"[14] and "C23, Distance to CGSA" could be read as redundant, both between themselves as well as with the System Information Update ("SIU") map requirement. The Commission should clarify exactly what measurements are being requested for C22 and C23 of Schedule C, and clearly distinguish those measurements so that the correct information can be accurately provided.

Southwestern Bell also believes that the Commission should take this opportunity to eliminate superfluous Commission Rule citations. On Form FCC XX, Schedule D, entitled "Additional Administrative Date," there is an "Eligibility" section requiring citations to Rule sections and a description of activity. While providing a description is a simple matter, the Commission should eliminate the need for applicants to provide long string cites to the Rules. Undoubtedly like others, Southwestern Bell often does not know when to stop providing cites to the Commission Rules inasmuch as one Rule leads to another. To avoid having to compile information that is unlikely to provide any insight into the application, the Commission should clarify that it is only

[14]Southwestern Bell understands "SAB" to be an acronym for "Service Area Boundary."

seeking the cite to that particular Commission Rule which requires the filing of the form.

VII. THE COMMISSION SHOULD SUBJECT SMR PROVIDERS TO THE SAME PCS ELIGIBILITY RULES AS ARE CELLULAR CARRIERS.

In the Commission's just released *Memorandum Opinion and Order* in the PCS licensing proceeding,[15] the Commission agreed with NEXTEL that the eligibility of wide-area SMR and other commercial radio service providers to participate in PCS licensing was beyond the scope of that proceeding, and was being addressed in this docket. Although Southwestern Bell was unable to find any reference to this issue in the *Further Notice*, the Commission must impose the same eligibility requirements on those providers as have been imposed upon cellular providers in order to be consistent with its purpose for the eligibility restrictions.

As explained by the Commission, those restrictions have been adopted to promote competition and the public interest by "maximizing the number of viable new entrants in a given market." *Id.* ¶ 103. NEXTEL's arguments that it is "too new and too small to have the capability of behaving anticompetitively" miss the point. As the Commission articulated, eligibility restrictions have not been imposed due to any assumption of illegal anticompetitive behavior. *Id.* Given that NEXTEL and other SMR providers have the spectrum necessary to provide a service in

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[15] *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Memorandum Opinion and Order* (released June 13, 1994).

direct competition with cellular, are already providing that service in some areas, and have announced plans to provide that service nation-wide, allowing those SMR licensees to escape the eligibility restrictions imposed upon cellular will not promote the maximum amount of diversity that the Commission is seeking.

Further, by imposing those same restrictions, the Commission will also incent NEXTEL and those SMR providers to use their existing spectrum more efficiently and deploy their networks more quickly. Moreover, the ability to fully use the spectrum under either license will also be lessened as capital, financial, and technical resources will have to be split as those providers attempt to build two networks. Finally, imposing the same eligibility restrictions on these services that compete with cellular is consistent with and enhances the Congressional intent of equity and equality that was behind the *Budget Act*.

For these same reasons, the Commission should clarify that SMR licenses will be immediately subject to any spectrum cap for CMRS providers that the Commission might adopt. There should be no three-year transition period for purposes of any cap. Those providers should not be allowed to take further advantage of the transition to stockpile spectrum during the interim period. The transition period was intended to avoid the immediate burden of being subject to the same degree of regulation to which cellular providers and other RCCs are already subject, not to allow those transitioning providers a loophole through which to cement a competitive advantage to exploit far

into the future. To allow those providers to escape the effects of any cap would be antithetical to the clear purpose of the *Budget Act*.

VIII. CONCLUSION

Southwestern Bell Corporation was a fervent supporter of the regulatory parity provisions of the *Budget Reconciliation Act*. By providing parity in the regulation of substitutable services, the Congress and now the Commission will encourage true competition which can only benefit the consumer in the long run. When implementing the terms of the Act, therefore, the Commission must be mindful of its own desire to allow the market and not regulation to determine competitive outcomes. Any impulse to differentiate among providers on the ground that this disparity will aid competition in weeding out providers, or any other seemingly laudable motive, therefore should be ignored.

For this reason, the Commission's proposal to impose additional tests before applying principles of regulatory parity should not be adopted. Nor should the Commission allow some providers (ESMRs) to choose the boundaries of their service territories when others are not given such freedom. Indeed, to facilitate regulatory parity the FCC should impose the same eligibility rules on ESMR providers which seek PCS licenses as those rules imposed on cellular providers. Similarly, a cap on the amount of spectrum which can be held by a single provider operating in multiple service niches is neither advisable nor

practicable because it would have the effect of closing out efficient providers without any proof of competitive harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martha R. Kiely, hereby certify that copies of the foregoing Initial Comments on *Further Notice Of Proposed Rulemaking* of Southwestern Bell Corporation have been served by first class United States mail, postage prepaid, on the parties listed on the attached.

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